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Supreme Court of the United States

OCTOBER TERM, 1946. No. 787.

STELLA CHISHOLM, Administratrix of the Estate of Howard Llewellyn Chisholm, deceased,
Petitioner,

v.

READING COMPANY, a corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

WM. CLARKE MASON,
HENRY R. HEEBNER,
2107 FIDELITY-PHILADELPHIA TRUST BUILDING,
PHILADELPHIA 9, PA.
Counsel for Respondent.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

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STATEMENT OF THE QUESTION INVOLVED.

In a suit under the Federal Employers' Liability Act where a railroad station employee was struck and killed by a freight train at a station crossing at night and the Petitioner not only failed to prove any negligence in the operation of the train or in the maintenance of a safe place to work but affirmatively proved the giving of proper warning signals of the train's approach with engine headlight burning brightly, did the Circuit Court of Appeals for the Third Circuit err in affirming the judgment entered on a directed verdict for the respondent?

STATEMENT OF FACTS.

The Petitioner sued to recover under the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, 45 U. S. C. A. Section 51 *et seq,* as amended, for damages suffered as a result of the death of Howard Llewellyn Chisholm, who was struck by a freight train early in the morning February 2, 1944. The negligence alleged was the failure of the Respondent to provide a safe place to work, to give the deceased notice or warning of the train's approach and to observe the position of the decedent at the time of the accident, violating the ordinances of Lansdale and the rules of the Company regarding the operation of trains.

Chisholm was the Respondent's ticket agent at Lansdale Station where he had been employed since July 3, 1943. The station building and ticket office at Lansdale were located on the east or northbound side of the tracks but there was also a platform and waiting room on the west or southbound side and one of Chisholm's duties was to tend the coal stove located in that waiting room during the heating season.

Between the two platforms there were two main tracks running north and south and a third track, known as the "Lansdale siding", which is the easternmost track of the three (11a). An inter-track fence separates the two main tracks and a gate with cross-walk connecting the two platforms affords access by employees from the station building to the waiting room on the west side of the tracks (15a). Main Street in Lansdale crosses the tracks at the south end of the station platform and Broad Street also crosses the tracks at grade south of MA tower, located 125 feet south of Main Street. The two westernmost tracks, known as the northbound and southbound main tracks, were straight for a distance of two miles north of Lansdale Station (11a). The southbound platform was 360 feet long and the gate through the inter-

track fence was opposite a point about in the middle of the platform (77a).

North of the southbound platform and west of the southbound main track there is a long siding, the switch at the south end of which is 180 feet north of the station building on the south platform (79a). This siding is 2,000 feet or 2,500 feet long (14a). The railroad tower, referred to as MA tower, was approximately 764 feet from the station building on the southbound platform (78a).

The decedent was on the night shift and did not come to the station until 11.40 P. M., February 1st (25a).

The testimony offered by the Petitioner established that station agent Thomas Wynne had received orders through MA tower to place his southbound cars on the Lansdale southbound siding (17a) and he had accordingly placed seventeen cars on that siding for subsequent movement (18a).

About 1 o'clock on the afternoon of February 1st, the station agent, Thomas Wynne, received a written order from MA tower stating that a train identified as CD 58 must move a fast freight from Bethlehem (20a). This train generally picked up southbound cars at Lansdale around 8 o'clock at night but the message indicated that it would not stop that night (22a). As a matter of fact, CD 58 did pick up three of the seventeen cars but did not remove the remainder (20a). Petitioner's testimony also showed that the station agent ordinarily received no information as to whether freight trains were going to stop (46a), that the dispatcher determined what trains would stop for the purpose of picking up cars (22a, 24a) and that information concerning the movement of cars was transmitted by the dispatcher in Philadelphia to MA tower (94a). While southbound freight trains usually stopped with the locomotive north of Main Street when they intended to pick up or drop cars on the southbound

siding, it was entirely up to the conductor to determine where the train should be brought to a stop.

The next southbound freight train after CD 58 was identified as the "Steel train" and passed Lansdale at 4:55 on the morning of February 2nd (61a). It was operated by Engineman Brennan and consisted of Engine 1754 and a full train of approximately 1900 tons (61a). This train was moving south at a speed of approximately 25 miles an hour upgrade from Orvilla toward Lansdale, had its headlight "full bright on" (62a), its engine bell ringing and sounded the proper whistle signals as it approached Lansdale Station. The Engineman saw no one on the southbound station platform or near the tracks until he saw the figure of a man strike the pilot of the engine (65a). This man was later identified as Chisholm. The Engineman testified that he was looking straight ahead for the street crossing and that the decedent was struck at the gate crossing, which is about opposite the middle of the shelter (66a). This train had received no orders to stop at Lansdale and therefore intended to proceed south to Philadelphia (63a). There was nothing to indicate what train was to pick up the fourteen remaining cars on the siding and haul them southward.

No testimony was offered on behalf of the Respondent and at the close of the Petitioner's case a motion for a directed verdict was made on behalf of the Respondent on the ground that the Petitioner had failed to meet the burden of proving that the decedent had met his death as a result of any negligence on the part of the Respondent. The court granted the motion and entered judgment for the Respondent. Thereafter motions filed on behalf of the Petitioner to set aside the verdict and judgment and for a new trial were filed and denied. On appeal to the Circuit Court of Appeals for the Third Circuit, the judgment was affirmed.

ARGUMENT.

The complaint charged the Respondent with negligence in failing to provide a safe place to work, failure to give the deceased notice or warning of the approach of the train, failure to observe the point and position of the deceased, violating the ordinances of Lansdale in regard to the operation of trains through the township, and violating the rules of the Company under the circumstances.

On behalf of the Petitioner, a number of the Respondent's employees were called as witnesses, and from them it was developed that the freight train which struck and killed Chisholm approached Lansdale station at about 4.55 A. M., February 2, 1944, at a speed of approximately twenty-five miles per hour. Petitioner's testimony affirmatively proved that proper warning signals of the train's approach were given by whistles and bell and that the strong headlight on the locomotive was burning brightly. The engineman testified that although he was looking ahead at the street crossing just south of the station platform as his locomotive approached the station, he saw no one on the platform or in a position of danger until he saw a black object hit the end sill on the engine and "then it threw him on the platform" (65a). The engineer further testified that the headlight on his engine enabled him to see everything along the tracks for a distance of 800 feet in front of him (64a). The "black object" was later identified as Chisholm.

There was no testimony regarding the existence of ordinances or Company rules, the violation of which was alleged in the complaint. Petitioner proved the existence of a paved walkway crossing the tracks connecting the two station platforms, with a gate in the inter-track fence between the north and southbound main tracks, thus

affording ready and easy access from one platform to the other by employees whose duties might require them to cross the tracks. There was no evidence to substantiate the allegations of negligence set forth in the complaint either with respect to the platform or the cross walk and therefore there was no basis for a finding that Respondent had not provided a reasonably safe place to work: *O'Mara* v. *Pennsylvania R. R. Co., 95 Fed. (2nd) 762* (C. C. A. 6th Circuit).

An effort was made to establish as a fact that it was the practice of the Company to notify the station agent as to what trains were to stop and what trains were not to stop at Lansdale station, and it is argued on behalf of the Petitioner that the failure of CD 58 to pick up the cars placed on the southbound siding entitled Chisholm to assume that the next freight train that came south would stop to pick up those cars. The evidence shows, however, that while the information regarding the stopping of trains or their failure to stop at Lansdale was communicated to the towerman operating MA tower, such information was not given by the towerman or anyone else to the ticket agent on duty in the station and no rule required that such information be given to him (46a and 115a). The evidence also shows that the stopping of trains to pick up or drop cars at Lansdale was entirely within the control of the dispatcher. Even if there had been evidence from which an inference could be drawn that there was a duty to give notice to Chisholm that the train would not stop at Lansdale, the accident was too remote to be anticipated as a natural and probable consequence of the failure to give such notice. As stated by this Court in Milwaukee & St. Paul Ry. Co. *v.* Kellogg, 94 U. S. 469, at 475, quoted in the opinion of this Court in *Brady* v. *Southern Ry. Co., 320 U. S. 476,* at pages 483-484:

> "But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

The opinion in Brady *v.* Southern Ry. Co., *supra,* continues:

> "Events too remote to require reasonable prevision need not be anticipated. It was so held as to an intervening embargo after a delay in transit which was caused by negligence. The Malcolm Baxter, 277 U. S. 323, 334. *Cf.* Northern Ry. Co. *v.* Page, 274 U. S. 65, 74; St. Louis-San Francisco Ry. Co. *v.* Mills, *supra.* Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury. Tiller *v.* Atlantic Coast Line R. Co., 318 U. S. 54, 67."

No evidence was offered by Respondent for the reason that the inescapable inference from the facts proved by the Petitioner was that the decedent either stepped or ran directly into the front of the locomotive in the face of positive warnings by bell and whistle and the inevitable noise made by a steam engine drawing a heavy freight train upgrade with a brightly burning headlight. Under such circumstances, there is such a complete failure of any proof of negligence, either in the operation of the train or in any other respect, that the lower court properly directed a verdict for the Respondent. *Fantini* v. *Reading Company, 147 F. 2d 543;* certiorari denied 325 U. S. 856, 89 L. Ed. 1976, 65 S. C. 1185.

CONCLUSION.

It is respectfully submitted that there is nothing in the record to support a finding that the decedent met his death as the result of any negligence on the part of the Respondent, and therefore the petition for a writ of certiorari should be denied.

Respectfully submitted,

WM. CLARKE MASON,
HENRY R. HEEBNER,
Counsel for Respondent.